THE SUPREME COURT'S THEORY OF A DIRECT TAX.

THE decision of the United States Supreme Court in the *Pollock* case[1] of 1895 was the beginning of an attempt on the part of the court to formulate a new definition of a direct tax, and since that time in every case which has called for a decision as to whether a particular tax was a direct tax the court has reverted to and tried to harmonize its decision with the reasoning set forth in the *Pollock* case. This decision overturned a fairly definite and universally accepted definition of a direct tax which had existed for nearly a century. In order to understand the new view in contrast with the old we find it necessary to review briefly the earlier period.

With the one exception of a tax on exports the constitutional grant of power to Congress to levy taxes is plenary, subject to two regulations:

(1) "* * * all duties, imposts, and excises shall be uniform throughout the United States."[2]

(2) "No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."[3] The same idea is expressed in another clause thus: "Representatives and direct taxes shall be apportioned among the several states * * * according to their respective numbers."[4]

Several investigations have been made of the records of the Constitutional Convention of 1787 and of the various state ratifying conventions in order to determine what meaning was attached to the term "direct tax."[5] It is not necessary here to cover this ground again but it is sufficient to say that the authoritative opinion of those who have examined the records is that there was no definite meaning agreed upon in the Convention and that it was a vague term. One writer summarizes the situation thus: "Amid this diversity of opinion only one thing is sure, namely, that no one knew exactly what was meant by a direct tax, because no two people agreed."[6]

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[1] 157 U. S. 429 and 158 U. S. 601. (1895).

[2] Article 1, sec. 8, clause 1.

[3] Article 1, sec. 9, clause 4.

[4] Article 1, sec. 2, clause 3.

[5] Seligman, E. R. A., The Income Tax. Macmillan; New York, 1914. Bullock, C. J., Origin, Purpose and Effect of the Direct-Tax Clause of the Federal Constitution. Political Science Quarterly, XV, 217, 452. Morrow, D. W., The Income Tax Amendment. Columbia Law Review, X, 379.

[6] Seligman, p. 569.

EARLY CASES.

In 1794 Congress levied a tax on carriages "for the convenience of persons which shall be kept by or for any person for his or her own use, or to be let out for hire, or for the conveying of passengers." The law was attacked as unconstitutional on the ground that it enacted a direct tax, which therefore should be apportioned. The matter came before the Supreme Court in the *Hylton* case.[7] HAMILTON, who argued the case for the Government, said, in part: "What is the distinction between direct and indirect taxes? It is a matter of regret that terms so uncertain and vague in so important a point are to be found in the Constitution. We shall seek in vain for any antecedent settled legal meaning to the respective terms—there is none." After pointing out the difficulty of applying the rule of shiftability, or incidence, or of making consciousness of paying it the test of a direct tax, he urged an interpretation which would permit the National Government to exercise the powers given —one of which was clearly the power to levy taxes. "The boundary, [between direct and indirect taxes] then," he argued, "must be fixed by a species of arbitration, and ought to be such as will involve neither absurdity nor inconvenience." Then followed HAMILTON'S distinction: "The following are presumed to be the only direct taxes: capitation or poll taxes; taxes on lands and buildings; general assessments, whether on the whole property of individuals, or on their whole real or personal estate. All else must of necessity be considered as indirect taxes."

The court accepted HAMILTON'S reasoning and the three judges who delivered opinions took the stand that only taxes which could be apportioned should be considered direct taxes.[8] In his opinion Justice CHASE delivered the following dictum: "I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution, are only two, to-wit, a capitation or poll tax, simply without regard to property, profession, or any other circumstance; and a tax on land. I doubt whether a tax, by a general assessment of personal property, within the United States, is included within the term direct tax."

Justice PATTERSON said: "Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax, and tax on land, is a questionable point."

Justice IREDELL said: " Perhaps a direct tax, in the sense of the Constitution, can mean nothing but a tax on something inseparably

[7] Hylton v. United States, 3 Dallas 171. (1796).
[8] Justices Chase, Patterson, and Iredell.

annexed to the soil, something capable of apportionment under all such circumstances."

The decision in the *Hylton* case was that a tax on carriages was a tax on expense and therefore an excise and not a direct tax.

In *Pacific Insurance Company* v. *Soule,*[9] the court held that a tax on the incomes of insurance companies was an indirect tax. The difficulty of apportionment was again emphasized in the opinion and there was a tendency to make the possibility of apportionment the test of a direct tax. The dicta of the judges in the *Hylton* case, that probably capitation taxes and taxes on land are the only direct taxes within the Constitution, were quoted.

In *Veazie Bank* v. *Fenno,*[10] a tax on state-bank notes was held to be not a direct tax. The *Hylton* case was again relied upon. The court said: "It may be rightly affirmed, therefore, that in the practical construction of the Constitution by Congress, direct taxes have been limited to taxes on land and appurtenances, and taxes on polls, or capitation taxes."

In *Scholey* v. *Rew,*[11] the court held that an inheritance tax was an indirect tax on the ground of its similarity in principle to the income tax which had already been declared to be constitutional.

Finally an income tax which had been imposed on individuals came up in the case of *Springer* v. *United States.*[12] The court said: "Our conclusions are, that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty."[13]

THE INCOME TAX CASE OF 1895.

The income tax law of 1894 came before the court in the case of *Pollock* v. *Farmers' Loan and Trust Company*[14] and was held unconstitutional. Since there was not a full bench at the first hearing and there was an even division of those justices present on some

[9] 7 Wallace 433. (1868).

[10] 8 Wallace 533. (1869).

[11] 23 Wallace 331. (1874).

[12] 102 U. S. 586. (1880).

[13] In the meantime Congress had levied direct taxes under the rule of apportionment in 1798, 1813, 1815, 1816, and 1861. The first four were limited to lands, improvements, dwelling houses and slaves. The act of 1861 omitted slaves from the above list.

The leading constitutional authorities such as Chancellor Kent, Justice Story, Cooley, and Justice Miller had accepted this "species of arbitration" by Hamilton and it seemed to be an established rule.

[14] 157 U. S. 429 and 158 U. S. 601. (1895).

of the questions at issue, a rehearing was granted and a second opinion given. The opinion in 157 U. S., may be summarized thus: (1) A tax on income from real estate is a tax on real estate, because the distinction between that which gives value to property and the property itself is a forced one. (2) A tax on real estate is a direct tax. (3) Therefore, a tax on income from real estate is a direct tax.

The results of the second opinion may be stated thus: (1) A general income tax is a general property tax. (2) Where the power lacks to tax a source it lacks to tax the income therefrom. (3) Power lacks to levy an unapportioned general property tax, therefore it lacks to levy an unapportioned general income tax. The fallacy in this reasoning lies in the assumption that any tax on property is a direct tax. A tax on income from property may amount to a tax on property but is it a direct tax?[15]

The question with which we are here concerned is whether this case yields a definition of a direct tax. The court began by giving the economic definition of a direct tax, that is, shiftability was made the test, and asserted that to be the true definition, but immediately left this view with the assertion that "we must inquire what the framers of the Constitution intended the term to mean." In only one other instance do we find Chief Justice FULLER alluding, even in a remote way, to the economic definition, and that was when he said there was no possible means of escape from payment of the tax on the part of real property holders. Because of this one vague reference and the fact that he nowhere attempted to show that this tax could not be shifted, we feel that the Chief Justice was not sure of his ground here and, therefore, did not rely upon this definition for his decision. We take this view despite the fact that Justice WHITE, in his dissenting opinion, strongly intimated that the court was construing the word "direct" in its economic sense, instead of in accordance with its meaning in the Constitution.

Chief Justice FULLER made much of the argument that the words were used in the Constitution in "their natural and obvious import," but nowhere did he tell us what that import was, and the mere assertion gets us nowhere.

The Chief Justice appeared extremely wary of making a positive statement which might be construed as some kind of a definition of

[15] The decision may be partly due to the poor handling of the case on the part of the Government. It practically admitted that the tax on incomes from state and municipal securities was a tax on the source while contending that a tax on rent was not a tax on land but a tax on so much personal property irrespective of its origin. It asserted that "rents in the pocket of the owner are not intrinsically and of themselves land. They are money, like any other." Thus by the government's own representation the tax was a tax on property though property in pocket.

a direct tax. In the opinion we find this question asked: "Can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?"[16] A few lines later he said the same reasoning should apply to the income from "capital in personalty."

Later courts have seized upon the phrase used here, "because of ownership," and interpreted it as an essential part of the opinion. The income tax, however, does not reach real estate which is not productive of an income although the element of ownership is the same as of that which produces an income. The income tax also reaches incomes which are not from property or incomes which may be partly from property and partly from other sources. Can it be said then that the tax was levied merely because of ownership? The court evidently realized the difficulties and presented the thought merely in the form of a question. It is hardly a reasonable interpretation to say that the court considered this phrase essential for arriving at the decision given.

The theory developed in some of the earlier cases of making the possibility of apportionment the test of a direct tax was thrown overboard entirely in this case.

Thus the court overthrew the old construction of a "direct tax" which had held for a hundred years and gave us no comprehensive definition in its place. It was left to succeeding courts to try to read into this opinion a workable definition.

DEVELOPMENT FROM THE POLLOCK CASE TO THE SIXTEENTH AMENDMENT.

The first case after the *Income Tax* decision in which the Supreme Court passed on the constitutionality of a tax was *Nicol* v. *Ames*,[17] A tax had been levied upon sales at business exchanges. The court's position here was a difficult one. It had now evidently persuaded itself that the principle underlying the *Pollock* case was that a tax upon property as such is a direct tax. At the same time it was confronted by counsel's argument that a tax upon sales is a tax upon the commodities sold,—a proposition supported by *Brown*

[16] 158 U. S. 627-628.
[17] 173 U. S. 509. (1899).

v. *Maryland.*[18] The logical conclusion, obviously, was to admit that a tax on sales was a direct tax and this indeed the court impliedly does do, notwithstanding the fact that a tax on sales had hitherto always been considered an excise. At the same time, however, the court did not wish to declare this particular tax void. The difficulty was accordingly solved by declaring the tax to be not upon the sales but "upon the privilege, opportunity, or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act." "It is not," the court proceeded, "a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of and actually employed in the transaction of the business, and separate and apart from the business itself. * * * It is not laid upon the property at all, nor upon the profits of the sale thereof, nor upon the sale itself considered separate and apart from the place and the circumstances of the sale."[19] The ominous possibilities of such a position are apparent, and they are not lessened by the court's careful disavowal of the tax before it as a tax upon business. For even the *Pollock* case avoids classifying such taxes as direct.[20]

The Federal War Revenue Act of June 13, 1898, imposed a succession tax upon legacies or distributive shares of personalty passing at death. It came before the Supreme Court in *Knowlton* v. *Moore,*[21] where the court encountered a second difficulty arising from its interpretation of the *Income Tax* case. Counsel presented the argument that there are certain inherent rights of ownership; that to tax these rights was to tax the property owned, and that the right of transmission was such a right. The court, however, maintained that the tax was not upon an inherent right but upon a privilege, and gave a long historical discussion in support of this view.[22] Nevertheless, *Knowlton* v. *Moore,* even more clearly than *Nicol* v. *Ames,* interprets the *Pollock* case as establishing the proposition that a tax upon property, either real or personal, because of its ownership, is a direct tax. This, however, is clearly to read into the earlier decision what is not there. No doubt the definition has a certain precision, but whether it is a workable definition is questionable. It is also to be noted that in *Knowlton* v. *Moore,* as well as in *Nicol* v. *Ames,* the court repudiates the economic definition of a direct tax, and declares somewhat darkly that in determining the

[18] 12 Wheaton 419. (1827).
[19] 173 U. S. 519-520.
[20] See 158 U. S. 635.
[21] 178 U. S. 41. (1900).
[22] Cf. Plummer v. Coler, 178 U. S. 115, and Murdock v. Ward, 178 U. S. 139.

validity of a tax its actual, practical results should be considered rather than the abstract ideas of theorists.[23]

In 1902 the court held that a tax upon manufactured tobacco in the hands of a dealer, not the manufacturer, was an excise and not a direct tax.[24] Justice BREWER said in part: "It is not a tax upon property as such, but upon *certain kinds* [italics are mine] of property, having reference to their origin and their intended use." Again the history of excises was relied upon in support of the result arrived at, but no reasoning was given to show why the tax before the court was not a tax upon property. The truth is that the argument of counsel that the tax was one upon personal property and, accordingly, by the *Pollock* case, a direct tax is logically unanswerable, and the court's only escape from it was to quote definitions of "excise" which could never have been framed in face of the idea that a tax on personalty because of ownership is a direct tax.

In *Thomas* v. *United States*[25] the court passed upon the constitutionality of a stamp tax on sales of certificates of stock which was imposed by the revenue act of 1898. Here the court was again brought face to face with the propositions, advanced by the attorneys, that (1) "the right of sale and transfer is an inherent attribute of property," and (2) "a tax upon the sale of articles is in substance a tax upon the articles themselves." This was a clear case of a tax on sales. The court, however, denied that it was a tax on sales and asserted that it was a privilege tax and therefore indirect, on the ground that the sale of stocks was but a *particular* business transaction in the exercise of the privilege enjoyed by corporations which are permitted to dispose of property in the form of certificates. The court said the words *duties, imposts* and *excises* "were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like." We thus obtain a form of definition for "indirect" tax, but its lack of harmony with the logic of the court's view of "direct" tax is palpable. Just as in *Patton* v. *Brady,* the court was willing to except "certain commodities" from the rule in the *Income Tax* case and thereby to emasculate the whole proposition.

In short, in the cases just reviewed, there is a clear inconsistency on the part of the court in trying to justify on historical ground, as indirect, taxes which by the definition avowed by it were direct.

[23] In this case it was also decided that uniformity, in the sense of the Constitution, meant simply geographical uniformity.

[24] Patton v. Brady, 184 U. S. 608. (1902).

[25] 192 U. S. 363. (1904).

The *Pollock* case rejected the historical view. Later courts have tried to straddle the two positions but they will not drive together.

The same revenue act of 1898 imposed a tax upon the gross annual receipts, in excess of $250,000, of any corporation or company carrying on or doing the business of refining sugar. The court held this to be a tax on the business of refining sugar and not on property.[26] It was, therefore, an excise and not repugnant to the Constitution. Again we perceive the practical effort of the court directed to sustaining the tax before it, matched, however, by a curious tenacity in adhering to an unworkable doctrine.[27]

The *Corporation Income Tax* case has much significance in the development of the theory of a direct tax, and shows once more the court's extreme hesitancy in declaring a tax to be a tax upon property.[28] The court here, just as in *Knowlton* v. *Moore,* interpreted the *Pollock* case as standing for the principle that a tax imposed upon property simply because of ownership is a direct tax. Nevertheless the income tax upon the doing of business under corporate organization was held to be "an excise upon the particular privilege of doing business in a corporate capacity." The tax is not payable, the court continued, unless business is carried on in the designated capacity. True, the tax was in form an income tax, but this was because the income was the measure of the privilege. Nor was it a valid objection that the measure included, "in part at least, property which as such could not be directly taxed." Using this same reasoning why could not a tax on the incomes of individuals be called a tax on the privilege of doing business—the business of investing funds, of renting real estate,—in short, of using property to produce income? The distinction is a narrow one at least.[29]

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[26] Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397. (1904).

[27] In South Carolina v. United States, 199 U. S. 437, (1905), a federal revenue officer had collected a certain sum from a state dispenser of liquors under the federal internal revenue laws. The court held that the tax was not imposed upon any property belonging to the state, but was a charge on a business before any profits were realized therefrom.

[28] Flint v. Stone Tracy Co., 220 U. S. 107. (1911).

[29] On the basis of this decision Mr. Underwood strongly supported an excise-tax bill in the House in 1912, which purported to extend to persons a tax similar to the one on incomes of corporations. It was purely an income tax as proposed, but Mr. Underwood sought to evade the decision in the Pollock case by calling it a tax on the carrying on of business and then proposed to measure the business, and hence the tax, by the amount of income from all sources. The term "business" was to be given a wide scope; for instance one who owns a house and rents it is in the business of renting real estate.

It would be interesting to know just how the court would have treated such a tax. It probably would have said that individuals had no privilege of doing business in a particular way as corporations had. Cong. Record, 62 Cong., 2nd sess. pp. 3497-3526.

THE BRUSHABER CASE AND THE INTERPRETATION OF THE SIXTEENTH AMENDMENT.

The Constitution recognizes but two classes of taxes, namely: (1) direct taxes, which should be levied according to the rule of apportionment; and (2) duties, imposts and excises, which should be levied according to the rule of uniformity. During the whole history of taxation the Supreme Court has never recognized any tax as falling intermediately between these two classes and included by neither. It had come to be recognized that all taxes fell within one of these two classes. When the Sixteenth Amendment was adopted which provided that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration," the general opinion was that the amendment took this particular direct tax and relieved it of the necessity of being apportioned, thereby creating an exception to the constitutional rule that all direct taxes should be apportioned. However, when the amendment came up for interpretation in *Brushaber* v. *Union Pacific Railroad Company*,[30] the court realized that if this interpretation were given there would be no constitutional limitations or restrictions whatever on the power to lay and collect income taxes, because they would be relieved of the rule of apportionment and at the same time would not come under the rule of uniformity. To the court this was undesirable and, therefore, their interpretation of the Sixteenth Amendment required a new interpretation of the opinion set forth in the *Pollock* case.

Chief Justice WHITE in the opinion said that "the conclusion reached in the *Pollock* case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property, but, on the contrary, recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone, and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it."[31] In other words the court clearly exceeded its power by declaring a tax to be a direct tax, which, in fact, was not a direct tax, merely because its enforcement would have the same effect as an unapportioned direct tax. To express it in still another form,

[30] 240 U. S. 1. (1916).
[31] 240 U. S. 16-17.

the constitutional fathers had in mind certain possible abuses of the taxing power and in order to remedy them they stipulated that all direct taxes should be apportioned. Then there arose a tax which was not a direct tax but which had the same possibilities of abuse that the fathers intended to remedy by the direct tax clause. Therefore, the court deemed it its duty to call such a tax a direct tax. The court deliberately broke the letter of the law in order to keep Congress from doing what the court thought the framers of the Constitution did not wish Congress to do. The Constitution was found wanting and the court supplied the deficiency.

We wish, however, to disagree emphatically with the Chief Justice, because we do not see how any fair and reasonable interpretation of the opinion in the *Pollock* case would warrant such a conclusion. When the court said that a tax on the income from real estate "fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct," and again: "Admitting that this act taxes the income of property irrespective of its source, still we cannot doubt that such a tax is necessarily a direct tax in the meaning of the Constitution," it clearly meant that a tax on income from property was a direct tax, and no explanation can make it appear otherwise. It is true, the anticipated effect of the income tax may have greatly influenced the court in formulating their opinion but that this was the basis of the decision cannot be gained from the opinion itself. There was, however, no inconsistency on the part of Chief Justice WHITE as he held a very similar view of the opinion in the *Pollock* case at the time it was given. This may be seen in the dissenting opinion of Justice WHITE with which Justice HARLAN concurred.[32] The *Brushaber* case clearly shows, there-

[32] "The right to tax, and not the effects which may follow from its lawful exercise, is the only judicial question which this court is called upon to consider. If an indirect tax, which the Constitution has not subjected to the rule of apportionment, is to be held to be a direct tax, because it will bear upon aggregations of property in different sections of the country, according to the extent of such aggregations, then the power is denied to Congress to do that which the Constitution authorizes, because the exercise of a lawful power is supposed to work out a result which, in the opinion of the court, was not contemplated by the fathers. If this be sound, then every question which has been determined in our past history is now still open for judicial reconstruction." 157 U. S. 643.

In this connection it is interesting to note that Justice Patterson in his opinion in the Hylton case said that the direct tax clause of the Constitution was made in favor of the Southern States, which had many slaves and extensive tracts of territory, thinly settled and not very productive; while the other states had but few slaves and several of them a limited territory, well settled and highly cultivated. "Congress in such case, might tax slaves, at discretion or arbitrarily, and land in every part of the Union after the same rate or measure; so much a head in the first instance, and so much an acre in the second."

fore that the court has forsaken the decision in the *Pollock* case and has accepted the view of Justice WHITE as expressed in his dissenting opinion.

Having given this interpretation of the *Pollock* case the Chief Justice proceeded in the *Brushaber* case to interpret the Sixteenth Amendment, which, he maintained, did not create a new kind of tax. The whole purpose of the amendment was to relieve all income taxes, when imposed, from the necessity of being apportioned because of consideration of the source whence the income was derived. It intended to do away with "the principle upon which the *Pollock* case was decided, that is, of determining whether a tax on income was direct * * * by taking into view the burden which resulted on the property from which the income was derived." Its aim was "the prevention of the resort to the sources from which a taxed income was derived in order to cause a direct tax on the income to be a direct tax on the source itself, and thereby to take an income tax out of the class of excises, duties, and imposts, and place it in the class of direct taxes." This position followed logically the interpretation given to the *Pollock* case and the excuse for it all is that it brought the income tax under the rule of uniformity.

The Chief Justice maintained that from the time of the *Hylton* case "it had come to be accepted that direct taxes in the constitutional sense were confined to taxes levied directly on real estate because of its ownership." He also asserted that this same view of the earlier cases was held in the *Pollock* case. The fact is, however, that the phrase "because of ownership" is a recent development in connection with the direct tax discussion and that the use of it in connection with those earlier cases is reading into them something that is not there.

The *Brushaber* case was followed by *Stanton* v. *Baltic Mining Company*,[33] where the income tax law was attacked on the ground that a tax on the product of a mine was a direct tax on property because of its ownership unless adequate allowance was made for the exhaustion of the ore body as a result of working the mine. The company averred that it was taxed one per cent upon its gross receipts during the year 1914 after deducting, (1) operating and maintenance expenses, and (2) losses including depreciation arising from depletion of its ore deposits to the limited extent of five per cent of the "gross value at the mine of the output" during the year. The contention was that the five per cent deduction was an inadequate allowance for the depletion of the ore body and therefore the law taxed not the mere profit arising from the operation of the mine

[33] 240 U. S. 103. (1916).

but also a portion of their principal or capital. The court largely evaded the issue as to whether such a tax was really an income tax and merely asserted that the rule established by the Sixteenth Amendment covered the case. Not quite satisfied with this explanation, however, the court, in order to show that the tax was not a direct tax on property because of ownership, relied upon the decision in *Stratton's Independence* v. *Howbert*[34] which, aside from the Sixteenth Amendment, affirmed that such a tax was not a tax upon property as such because of its ownership, but a true excise levied on the results of carrying on mining operations.

SUMMARY.

The definition of a direct tax before 1895 was a tax directly imposed on real estate and invariably such impositions as income taxes, inheritance taxes, and taxes on bank notes were held not to be direct taxes. Since the *Pollock* case, moreover, we see an evident desire on the part of the court to uphold the hands of Congress in regard to the taxing power, with the result that no tax levied by Congress since that date has, as before, been held to be an unapportioned direct tax.

In the *Pollock* case, which stands out accordingly as a unique product of judicial solicitude for the salvation of society against itself, the bugaboo of socialism set forth by the attorneys for the complainant caused the court to declare a tax on income from property, real or personal, to be a direct tax. From this case has developed the present view of the court as to a direct tax which is substantially as follows: any tax on property, real or personal, because of its ownership is a direct tax. In every decision, however, since the *Pollock* case the tax has been held to be not upon property because of its ownership, but upon the peculiar right, privilege, or facility enjoyed or used, or upon the business involved, and valid as an excise.

This definition of a direct tax is vague and unsatisfactory. What test will the court apply to determine whether a tax is on property because of ownership? None has been developed so far and in each new case that comes up the court gropes around for some *pro hac vice* basis for a decision. Will the *Brushaber* case be interpreted as overthrowing the doctrine that a tax on an inherent right of ownership is a direct tax upon the property owned? If so the implied view of the court in *Nicol* v. *Ames,* that a tax on sales in general is a direct tax on property, would not now hold. It may

[34] 231 U. S. 399. (1913).

be that the court, on the basis of the *Brushaber* case, will finally go back to the definition of "direct" tax which was held before the *Pollock* case. There is but one step more to take. However, the situation at present is this,—when the court wants to uphold a tax law of Congress it merely says the tax is not one on property because of ownership. On the other hand, in many instances, if the court should think a particular tax undesirable it could just as readily evoke a revelation from its inner consciousness that the tax *was* one on property because of ownership.

J. H. RIDDLE.

Princeton University.